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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD ALAN SIMPSON,

Defendant and Appellant.

B296083

(Los Angeles County  
Super. Ct. No. TA127755)

APPEAL from an order of the Superior Court of Los Angeles County, Richard R. Campo, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Amanda V. Lopez and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Donald Simpson appeals from a postconviction order denying his petition for resentencing under Penal Code section 1170.95.<sup>1</sup> The court found Simpson did not qualify for resentencing because the jury found true the special circumstance under section 190.2, subdivision (a)(17)(A), that the murder was committed during the commission of a robbery, for which the jury had to find Simpson had the intent to kill or was a major participant in the crime and acted with reckless indifference to human life. On appeal Simpson contends the trial court erred in summarily rejecting his petition without first appointing him counsel, inviting a response from the People, and holding a hearing. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

The information charged Simpson with 12 counts, including murder (§ 187) (count 1), with the special allegation the murder was committed while Simpson was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(A)).<sup>3</sup> (*Simpson I, supra*,

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> The evidence presented at trial is set forth in our opinion in *Simpson I, supra*, B271460.

<sup>3</sup> Section 190.2, subdivision (a)(17), provides for a penalty of death or life imprisonment without the possibility of parole if “[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or

B271460.) The information alleged Simpson personally used a firearm in connection with the murder and specified other charges (§ 12022.53, subd. (b)), and the murder and specified offenses were committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)). (*Simpson I, supra*, B271460.) The jury convicted Simpson on all counts and found each of the special allegations true.

In *People v. Simpson* (July 11, 2017, B271460) (nonpub. opn.) (*Simpson I*) we affirmed Simpson’s convictions but remanded for resentencing in light of multiple sentencing errors. On remand following our opinion in *Simpson I, supra*, B271460, the trial court sentenced Simpson to an aggregate state prison sentence of life without the possibility of parole, plus a life sentence with a 25-year minimum parole eligibility period, plus 44 years four months. Simpson again appealed, contending the trial court’s imposition on remand of a consecutive life sentence with a 25-year minimum parole eligibility period was an unauthorized sentence. We agreed and directed the trial court to correct the minute order and abstract of judgment to strike the reference on count 1 for murder to a 25-year minimum parole eligibility period. (*People v. Simpson* (Apr. 3, 2019, B291875) [nonpub. opn.] (*Simpson II*).) But we rejected Simpson’s argument we should vacate his conviction of first degree murder by applying Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437) retroactively, concluding the exclusive remedy for Simpson to obtain relief under Senate Bill 1437 was to petition for relief under section 1170.95. (*Simpson II, supra*, B291875.)

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attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 . . . .”

On February 7, 2019 Simpson, in pro per., filed a petition for relief stating he had met the requirements under section 1170.95 for relief under Senate Bill 1437, including that (1) the information allowed the prosecution to proceed under a theory of felony murder; (2) he was convicted of murder based on a theory of felony murder; and (3) Simpson could not be convicted of first or second degree murder under changes to sections 188 and 189 effective January 1, 2019. Simpson requested the court appoint him counsel and vacate his murder conviction. In his declaration Simpson stated the jury was instructed on the elements to prove the alleged special circumstance under section 190.2, subdivision (d); if the jury found the special circumstance under section 190.2, subdivision (d), true, this “would potentially disqualify [Simpson] from relief”; the jury did not find the special circumstance true; and because the jury did not find the special circumstance true, Simpson qualified for relief.<sup>4</sup>

On February 11, 2019 the superior court summarily denied Simpson’s petition without Simpson or any counsel present, finding, “The jury not only found the petitioner guilty of first degree murder but also found true, the special circumstance under [section] 190.2[, subdivision] (a)(17)(A), that the robbery was committed while the petitioner was engaged in the commission of a robbery. The jury was instructed that they could not find the special circumstance allegation true unless they found that the petitioner had the intent to kill or the petitioner

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<sup>4</sup> According to the petition, Simpson attached exhibits, including the information, jury instruction on the special circumstance allegation, and verdict forms. Although the clerk’s transcript does not include the exhibits, they are part of the record in *Simpson I, supra*, B271460.

was a major participant in the crime and that he acted with reckless indifference to human life. (See CALCRIM No. 703). In fact, by finding the allegation to be true, the jury had to have found that petitioner, even if not the actual killer, acted with the intent to kill or was a major participant and acted with reckless indifference to human life. [¶] Therefore, due to the jury’s findings as stated and pursuant to . . . section 189[, subdivision] (e)(3), the petitioner does not qualify for resentencing [under] section 1170.95.” The court ordered the hearing on Simpson’s petition taken off calendar.

Simpson timely appealed.

## DISCUSSION

### A. *Senate Bill 1437*

On September 30, 2018 Senate Bill 1437 was signed into law, effective January 1, 2019. Senate Bill 1437 was enacted to “amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Sen. Bill 1437 (2017-2018 Reg. Sess.) § 1; see *People v. Verdugo* (2020) 44 Cal.App.5th 320, 325 (*Verdugo*); *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).) “Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability.” (*Martinez*, at p. 723; accord, *Verdugo*, at p. 325.)

New section 188, subdivision (a)(3), provides, “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.” Prior to the enactment of Senate Bill 1437, murder committed in the perpetration of or attempt to perpetrate specified felonies, including robbery, was first degree murder. (Former § 189; *People v. Powell* (2018) 5 Cal.5th 921, 942 [““Under the felony-murder doctrine, when the defendant or an accomplice kills someone during the commission, or attempted commission, of an inherently dangerous felony, the defendant is liable for either first or second degree murder, depending on the felony committed.””].) Senate Bill 1437 also added section 189, subdivision (e), which provides that “[a] participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”

As we discussed in *Simpson II*, the legislation also added section 1170.95, which provides a procedure for people convicted of murder to petition the trial court for retroactive relief if the changes in the law affect their previously sustained convictions. (Sen. Bill 1437 (2017-2018 Reg. Sess.) § 4.) Section 1170.95, subdivision (a), provides, “A person convicted of felony murder or

murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.” Section 1170.95, subdivision (b)(1), provides that the petition “shall be filed with the court that sentenced the petitioner.”

Pursuant to section 1170.95, subdivision (b)(1)(A), the petition must include a declaration by the petitioner that he or she is eligible for relief under the section. As we explained in *Verdugo, supra*, 44 Cal.App.5th at page 327, “If any of the required information is missing and cannot be readily ascertained by the court, ‘the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.’ (§ 1170.95, subd. (b)(2).) [¶] If the petition contains all required information, section 1170.95, subdivision (c), prescribes a two-step process for the court to determine if an order to show cause should issue: ‘The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall

file and serve a response . . . and the petitioner may file and serve a reply . . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.”

After issuing an order to show cause, the trial court must hold a hearing “to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts . . . .” (§ 1170.95, subd. (d)(1).) If a hearing is held, “[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.” (§ 1170.95, subd. (d)(3).) “[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.” (*Ibid.*)

B. *The Trial Court Did Not Err in Summarily Denying the Petition Without Appointing Counsel or Holding a Hearing*

Simpson contends under section 1170.95, subdivision (c), he was entitled to appointment of counsel and a hearing because he alleged facts that, if true, would have entitled him to relief. We rejected this contention in *Verdugo*, concluding the Legislature intended for there to be a three-step evaluation of a section 1170.95 petition. (*Verdugo, supra*, 44 Cal.App.5th at pp. 328, 332-333 .) Under section 1170.95, subdivision (b)(2), the court performs an initial review to determine the facial sufficiency of the petition. (*Verdugo*, at p. 328.) As part of this review, if the court determines any of the information required under section 1170.95, subdivision (b)(1), is missing “and cannot be readily ascertained by the court,” the court may deny the petition without prejudice. (*Verdugo*, at pp. 327-328.)



As part of the first prima facie determination required by section 1170.95, subdivision (c), the court may consider the same documents available for the initial review under subdivision (b)(1), including “documents in the court file or otherwise part of the record of conviction that are readily ascertainable.” (*Verdugo, supra*, 44 Cal.App.5th at pp. 327, 329 [superior court properly considered record of conviction and appellate opinion affirming conviction in concluding defendant had intent to kill because of conviction of conspiracy to commit murder]; accord, *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1138-1139 [superior court properly relied on record of conviction showing he was convicted as direct aider and abettor in determining he was not eligible for relief].)

As we explained in *Verdugo*, to determine whether the petitioner is eligible for relief on the basis he was convicted of first or second degree murder under a charging document that permitted the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences theory, “the court must at least examine the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment.” (*Verdugo, supra*, 44 Cal.App.5th at pp. 329-330.) We added, “The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding Senate Bill 1437’s amendments to sections 188 and 189 (see § 1170.95, subd. (a)(3))—for example, a petitioner who admitted being the actual killer as part of a guilty plea or who was found to have personally and intentionally discharged a firearm causing great

bodily injury or death in a single victim homicide within the meaning of section 12022.53, subdivision (d).” (*Id.* at p. 330.)

Here, the jury found the special circumstance allegation under section 190.2, subdivision (a)(17)(A), to be true. (*Simpson II, supra*, B291875.) Further, the trial court properly instructed the jury with CALCRIM No. 703, which provides to prove the special circumstance true for a defendant who is not the actual killer, the People must prove beyond a reasonable doubt “either that [d]efendant Simpson intended to kill, or the People must prove all of the following: [¶] 1. Defendant Simpson’s participation in the crime began before or during the killing; [¶] 2. Defendant Simpson was a major participant in the crime; [¶] AND [¶] 3. When Defendant Simpson participated in the crime, he acted with reckless indifference to human life.”

Simpson was therefore not eligible for relief under Senate Bill 1437 because under section 189, subdivision (e), he could still be convicted of murder based on his intent to kill or that he was a major participant in the robbery and acted with reckless indifference to human life. (*People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 414, 419 [petitioner not eligible for relief under Senate Bill 1437 because jury found true special circumstance allegation that murder was committed during commission of a robbery]; see *People v. Gonzalez* (2018) 5 Cal.5th 186, 202 [felony-murder special-circumstance instructions required jury to find aider and abettor intended to kill or was a major participant and acted with reckless indifference to human life].)

Because Simpson failed to make the initial prima facie showing for relief under section 1170.95, subdivision (c), he was not entitled to appointed counsel or a hearing. (*Verdugo, supra*,

44 Cal.App.5th at pp. 332-333 [“If, as here, the court concludes the petitioner has failed to make the initial prima facie showing required by subdivision (c), counsel need not be appointed.”]; *People v. Lewis, supra*, 43 Cal.App.5th at p. 1140 [“[T]he trial court’s duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner ‘falls within the provisions’ of the statute.”].)

### **DISPOSITION**

The order denying Simpson’s petition for resentencing is affirmed.

FEUER, J.

We concur:

PERLUSS, P. J.

ZELON, J.